Supreme Court, U.S.
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No. —— 00 341

IN THE

Supreme Court of the United States

GILES H. DUNN and GAIL W. DUNN,
Petitioners,

v.

THE COMMONWEALTH OF MASSACHUSETTS,
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS,
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the principle of reasonable investment backed expectation should apply to the Petitioners, who acquired their property by inheritance.

2. Whether the Petitioners can be deprived of a trial by jury in a claim made under the State Declaratory Judgment Act.

3. Whether the Petitioners can be denied just compensation, when the proposed use of their property would not create a public nuisance.

LIST OF PARTIES

The Petitioners are Giles H. Dunn and Gail W. Dunn.

The Respondent is The Commonwealth of Massachusetts, Executive Office of Environmental Affairs, Department of Environmental Protection.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully pray that a writ of certiorari issue to review the Memorandum and Order of the Appeals Court of the Commonwealth of Massachusetts entered March 27, 2000, and the denial of the Petitioners' Application for Further Appellate Review by the Supreme Judicial Court of the Commonwealth of Massachusetts dated June 2, 2000.

OPINIONS BELOW

On June 2, 2000, the Supreme Judicial Court denied an application for further appellate review (App. 1a) of the unreported memorandum and order of the Appeals Court of the Commonwealth of Massachusetts (App. 13a), affirming the judgment of the Superior Court for the County of Suffolk, which was also unreported but is set forth in the appendix, at App. 3a.

JURISDICTION

The jurisdiction of this Court to review the June 2, 2000, Order of the Supreme Judicial Court of the Commonwealth of Massachusetts denying the Petitioners' Application for Further Appellate Review is invoked under 28 U.S.C. § 1257, which provides as follows:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute or the United States is drawn in question or where the validity of a statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. . . .

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use without just compensation."

The Seventh Amendment of the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment provides, in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

42 U.S.C. § 1983 provides:

> Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Article X of the Massachusetts Constitution provides, in pertinent part:

> "but *no part* of the property of any individual, can, with justice, be taken from him, or applied to public uses, without his own consent . . . . And whenever the public exigencies require that the property of any individual should be appropriated to public use, he shall receive a reasonable compensation therefor. (Emphasis supplied).

Massachusetts has adopted the Uniform Declaratory Judgment Act and it is cited in The General Laws of Massachusetts as c. 231A (App. 45a).

The General Laws of Massachusetts, c. 131, § 40, in pertinent part, provides:

> No person shall remove, fill, dredge or alter any bank, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow or swamp bordering on the ocean or on any estuary, creek, river, stream, pond, or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding, ...

STATEMENT OF THE CASE

The Petitioners are the owners of a lot of land containing 1.106 acres (App. 29a), abutting Fresh Pond Cove which is part of Buzzard's Bay located in the southeasterly part of Massachusetts (App. 28a, 29a, 51a).

Immediately to the rear of the Petitioners' lot is a body of fresh water known as Fresh Pond. Thus, the Petitioners' land is located between Fresh Pond and Fresh Pond Cove and is a coastal dune and barrier beach (App. 29a). There are houses located immediately adjacent to the Petitioners' land on the barrier beach/coastal dune between Fresh Pond and Fresh Pond Cove (App. 47a, 49a, 50a)

The locus is located on Connett Point and all of Connett Point was owned by the Dunn family from at least the beginning of the century and was subdivided in 1936 (App. 25a, 28a).

The Petitioner, Giles H. Dunn, became the owner of the locus when he inherited it from his mother in 1985 and in 1986 conveyed it to himself and his wife (App. 28a).

The Petitioners also own a lot which is occupied by a building similar to the building proposed by the Petitioners (App. 50a).

The Petitioners' land and the type of the proposed construction are also depicted on the photographs (App. 47a, 49a, 50a).

The Petitioners propose to construct a single family house on their property, similar to the houses shown on the photographs. The house would be elevated on pilings and serviced by a septic system, which could be located on the dune, similar in kind to the adjacent homes (App. 23a). The use is permitted by the Town of Mattapoisett's Zoning By-Law (App. 28a).

The Petitioners had entered into a purchase and sale agreement to sell the property (App. 17a, 42a-43a). The Petitioners did receive a permit to construct the building pursuant to the wetlands statute, but an appeal was filed by the Respondent and a Superseding Order of Conditions was issued (App. 17a-18a). The Petitioners lost the sale because they were unable to obtain a building permit as required by the purchase and sale agreement (App. 42a).

The Petitioners, subsequent to the denial of an Order of Conditions, filed a Complaint/Petition (App. 16a-21a) with the Superior Court seeking three separate forms of relief: (1) as allowed by the Massachusetts statutes, General Laws, c. 131, that the Court make a determination that the action of the Respondent was not justified and issue an order allowing the construction of the building (App. 20a); (2) as allowed by the Massachusetts Declaratory Judgment Act, that the Court make a binding determination that there was a temporary taking of the Petitioners' property (App. 20a); and (3) as

allowed by the Massachusetts Declaratory Judgment Act, that the Court make a binding declaration that the Petitioners were deprived of the use of their property and assess damages as required by the United States Constitution and the Constitution of Massachusetts (App. 20a). The Petitioners also demanded a trial by jury on all issues (App. 20a).

The matter was heard by the Superior Court on the Petitioners' Motion for Judgment on the Pleadings as to the first request for relief, that is, the issuance of an order allowing the construction of the building. The Superior Court remanded the matter to the Respondent for a hearing on the Petitioners' variance request and "to ascertain exactly the uses to which *the land* may lawfully be put." (emphasis added). (App. 4a, 22a). In response to the order of the Superior Court, a finding was made that as a matter of zoning the project proposed by the Petitioners was permissible, subject to the uses which would be permitted by the Massachusetts Wetlands Act which are set forth as non-structural and structural uses (App. 6a, 29a, 30a, 37a). The motion was denied and the Court entered a judgment affirming the decision of the Respondent (App. 3a-7a). There was no decision as to the two remaining claims for relief contained in the Petitioners' Complaint.

The Appeals Court entered a decision affirming the judgment of the lower court (App. 13a-14a).

An Application for Further Appellate Review was filed with the Supreme Judicial Court and was denied (App. 1a).

The loss of the use of the Petitioners' property without just compensation was initially asserted by the Petitioners at the time of the filing of the Complaint (App. 16a-21a) and was also asserted at the Appeals Court and the Supreme Judicial Court levels (App. 13a).

REASONS FOR GRANTING THE PETITION

I. THE PRINCIPLE OF REASONABLE INVESTMENT BACKED EXPECTATION SHOULD NOT APPLY TO LANDOWNERS WHO ACQUIRED TITLE BY INHERITANCE.

The Petitioners in the matter before this Court inherited the property after the regulation was enacted (App. 29a).

The first time that reasonable investment backed investment was declared to be the law to be applied in claims for inverse condemnation was in the case of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978).

> So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment.

Investment backed expectation was not defined in the *Penn Central* case. However, investment contract was defined in the case of *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 851 (1974), in which it was stated that you must examine the economic realities of the transaction rather than the names that may have been employed by the parties and as to whether the ownership of the property involved an investment of money in a common enterprise with profits to come solely from the efforts of others.

The Petitioners were never involved in the investment of money in a common enterprise. They acquired the property from their ancestors.

The principle of reasonable investment backed expectation should not apply to the Petitioners, who inherited the property. The Petitioners were not entrepreneurial in acquiring the property, as was stated in *Penn Central, supra*, nor did

they intend to profit from the land and obtain a "reasonable return" on their investment because the obvious fact of the matter is that the Petitioners never made an investment.

To allow the principle of reasonable investment backed expectation to be applied to inheritors of property is a punishment based solely on heritage. The Petitioners are entitled to be justly compensated for the loss of the use of their land in an amount to be determined by a jury.

It should be noted that in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-1028 (1992), reference was made to the principle of reasonable investment backed expectation as it relates to the ownership of personal property.

> And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least of the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

The Appeals Court erred when it stated that the claim of the Petitioners fails because the Wetlands Protection Act was in existence before the Petitioners acquired title to the property and that their property rights consequently were limited by the Act when they acquired title (App. 13a).

This Court ruled in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987).

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to

> implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

The application of the principle of reasonable investment backed expectation should not be allowed to deprive the Petitioners of any property rights given to the Petitioners by the United States Constitution. That principle is not and should not be applicable to the inheritors of land.

II. LANDOWNERS SHOULD NOT BE DEPRIVED OF A TRIAL BY JURY IN A CLAIM FOR INVERSE CONDEMNATION, WHICH CLAIM WAS MADE UNDER THE STATE DECLARATORY JUDGMENT ACT.

> The right to trial by jury was obtained at a price so great in blood, battle, and sacrifice, that the common-law systems of jurisprudence jealously guards against the least encroachment thereon, and is ever ready to stay the hand that seeks, by any sort of subterfuge, to trench upon that sacred right. It takes more than a colorable attempt to have the proceeding parade as an equitable one to destroy this heritage of the common law. *Anderson, Declaratory Judgments*, West Publishing 1940, p. 502.

The United States Supreme Court has decided, in the case of *Monterey v. Del Monte Dunes*, 119 S.Ct. 1624 (1999), that a landowner has the right to a trial by jury on inverse condemnation cases. In that case, that right was claimed when a suit was brought under 42 U.S.C. §1983.

The Petitioners in this case are seeking the right to a trial by jury as set forth in the State Declaratory Judgment Act for a "constitutional tort".

In *Monterey, supra*, at 1644, the Court did not address the jury's role in an ordinary inverse condemnation suit. The

Commonwealth of Massachusetts does not have, as the State of California does have, "a facially adequate procedure for obtaining just compensation for temporary takings such as this one."

In this case, as in *Monterey, supra*, at 1644, there is no "broad challenge to the constitutionality of the [state's] general land-use ordinances or policies, ... "

In *Monterey, supra*, at 1648, this court stated: "This Court has long assumed that . . . actions for damages to a person or property . . . are actions at law triable to a jury."

The Massachusetts Declaratory Judgment Act, General Laws of Massachusetts, c. 231A, § 1, specifically reserves to the Petitioners, "the determination of issues of fact triable by a jury as of right and as to which a jury trial is duly claimed by the party entitled thereto, ..."

The Massachusetts Declaratory Judgment Act is very specific as to the right to a trial by jury. There is no mention in § 1983 of 42 U.S.C. of the right to a jury trial as there is in the Massachusetts Declaratory Judgment Act.

By the action of the Massachusetts Courts, the Petitioners were deprived of the right to have all of the factual issues determined by a jury, including the issue of whether or not the action of the Respondent deprived the Petitioners of substantially all of the economic use of their property as was stated in *Lucas, supra*, at 2893:

> The oft-cited maxim that, while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . In 70 odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to engage in . . . essentially ad hoc, *factual* inquiries. (Emphasis supplied).

III. THE RESPONDENT HAS THE BURDEN TO PROVE THAT THE PROPOSED CONSTRUCTION WOULD CREATE A NUISANCE.

To determine whether a taking was made of the Petitioners' property as a result of the enactment of the regulation, the Respondent is required to prove that the erection of the proposed house by the Petitioners would be subject to a common law action for public nuisance. See *Lucas v. South Carolina Coastal Council, supra*, at 1031.

> Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.

There was no finding by the lower court that the construction of the house would create a nuisance, nor did the Respondent, upon whom the burden of proof has been placed by the *Lucas* case, prove that the construction of the house would create a nuisance. If it cannot be proven that the construction of the house would create a nuisance, then the Petitioners should receive compensation as allowed by the United States Constitution or Article X of the Declaration of Rights of the Massachusetts Constitution, or both.

There is a difference between the rights granted to the Petitioners under the Fifth Amendment of the United States Constitution and Article X of the Massachusetts Constitution, adopted in 1780.

The Massachusetts Constitution states that "no part" of the property of any individual can be taken without his consent, unless he receives a reasonable compensation therefor. The Constitution of four other states has similar requirements:

Pennsylvania, Article VIII (1776), Delaware, Section 10 (1776), Vermont, Article IX (1777), and New Hampshire, Article XII, (1784).

The phrase "no part" does apply to the bundle of rights owned by the Petitioners, rather than the requirement under the United States Constitution that the Petitioners must be deprived of substantially all of the economically beneficial use of their property.

In the case *Commonwealth v. Johnson*, 417 Mass. 498, 501 (1994), the Massachusetts Supreme Judicial Court stated: "Words of the Constitution cannot be ignored as meaningless since all of the words of the Constitution must be presumed to have meaning."

Additionally, the Massachusetts Supreme Judicial Court has stated that that Massachusetts Constitution can be interpreted more broadly than the Constitution of the United States. See *Attorney General v. Colleton*, 387 Mass. 790, 795-796 (1982).

> The phraseology of the Massachusetts Constitution, however, is different from that of the Fifth Amendment. . . . This Court has expressly observed that, when interpreting the Massachusetts Constitution, we are not bound by Federal decisions which are less restrictive in some aspects than our Declaration of Rights. [citation omitted]. In fact, on occasion we have exercised our prerogative to interpret our Constitution more broadly. The United States Supreme Court has recognized that 'a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.' (emphasis in original). *Oregon v. Hass*, 420 U.S. 714, 719 (1975).

Accordingly, the Massachusetts Constitution and four other states, more than 200 years ago, did take into consideration what is commonly referred to as the bundle of property rights.

The common law property principle that there is a group of rights inhering in the citizen's ownership of property, is stated in the case of *Penn Cent. Transp. Co., supra*, p. 142.

> . . . has frequently emphasized the entire 'group of rights inhering in the citizen's [ownership'. *United States v. General Motors Corp.*, 323 U.S. 373 (1945). The term is not used in the 'vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denote[s] the *group of rights* inhering in the citizen's relation to the physical thing, *as the right to possess, use and dispose of it*. . . . The constitutional provision is addressed to *every sort of interest* the citizen may possess.' *Id.*, at 377-378 (emphasis added).

The Petitioners should be either allowed to construct a house similar in kind to those depicted in the photographs (App. 47a, 49a. 50a) in accordance with the *Lucas* decision, or be allowed to prove their damages in the taking of their property before a jury of their peers, as required by the United States Constitution, in accordance with the *Monterey* decision.

CONCLUSION

For all of the reasons presented herein, this petition for a writ of certiorari should be granted.

The decisions of the Massachusetts Courts do not comply with just compensation clause of the United States Constitution, do not coincide with the Seventh Amendment of the United States Constitution require trials by jury, and are in direct conflict with the decisions of this Court, in particular, the *Lucas* and Monterey decisions.

Respectfully submitted:

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